2020 Appeals Webinar

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Prosecutorial Misconduct ... Error

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Prosecutorial ~~Misconduct~~ . . . Error

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In re Martinez, 248 Ariz. 458 (2020)

- Distinguished prosecutorial-error claims from prosecutorial-misconduct claims
  - "When reviewing the conduct of prosecutors in the context of 'prosecutorial misconduct' claims, courts should differentiate between 'error,' which may not necessarily imply a concurrent ethical rules violation, and 'misconduct,' which may suggest an ethical rule violation." 470, ¶ 47.

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Ethical Rules discussed *In re Martinez*

- ER 3.8 [cmt 1]. Special Responsibilities of a Prosecutor
  - "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate" and has the duty "to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons."
  - *In re Peasley*, 208 Ariz. 27, 35, ¶ 34 (2004) (recognizing that the ethical rules impose high ethical standards on prosecutors)

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- Rule 41(g) of the Arizona Rules of the Supreme Court states that member shall avoid engaging in unprofessional conduct
  - Unprofessional conduct means "substantial or repeated violations of [the Oath] or the [Creed]"
  - Violations of this Rule are actionable
  - Example: sexual harassment of subordinates and/or staff is an actionable violation of this Rule https://www.azcourts.gov/Portals/21/SeparateOrdersFromMinutes/ASC-CV200035%20-%207-13-2020%20-%20FILED%20-%20ASC%20DECISION%20ORDER.pdf?ver=2020-07-13-155805-893

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ER 4.4(a) Respect for the Rights of Others: “In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden any other person, or use methods of obtaining evidence that violate the legal rights of such a person.”

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- ER 8.4(d) Misconduct: "It is professional misconduct for a lawyer to … engage in conduct that is prejudicial to the administration of justice."
  - A lawyer can violate this Rule by conduct that is merely negligent
  - In this case, the prosecutor's emotional appeals to the jury violated ER 8.4(d) given his experience and his awareness that the appellate courts had disapproved of his emotional appeals in other cases. 463–64, ¶¶ 10–11. 464–65, ¶ 17.
  - Other examples: Improper personal attacks against opposing counsel in argument (464, ¶ 14) and disparaging comments regarding opposing counsel made outside the presence of the jury (465, ¶ 18)

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Review of Prosecutorial-Error Claims

Two-Stage inquiry: a defendant bears the burden to show

(1) the prosecutor committed error and

(2) a reasonable likelihood exists that the prosecutor's error could have affected the verdict, *State v. Goudeau*, 239 Ariz. 421, 465, ¶ 193 (2016), i.e., the prosecutor's error and/or misconduct 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *State v. Hughes*, 193 Ariz. 72, 79, ¶ 26 (1988) (citing *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)).

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The prosecutor's intent is irrelevant!

Courts and appellate attorneys frequently and incorrectly assert that:

Prosecutorial error/misconduct "is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial."

No such showing is required to establish a prosecutorial-error claim.

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Courts then review for the cumulative effect

Again, the defendant does **not** have to show that the prosecutor intentionally engaged in the alleged error or misconduct

However, courts and appellate attorneys frequently cite to *Pool* for the proposition that:

- "We may reverse a conviction due to prosecutorial misconduct if 'the cumulative effect of the alleged acts of misconduct shows that the prosecutor intentionally engaged in improper conduct and did so with difference, if not a specific intent, to prejudice the defendant." *State v. Riley*, 248 Ariz. 154, 193, ¶ 158 (2020); *see also State v. Murray*, 247 Ariz. 447 (App. 2019).

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Example Cumulative Effect

State v. Hughes, 193 Ariz. 72, 79, ¶ 26 (1988)

- The prosecutor accused the defendant's mental health experts of fabrication. ¶ 61.
- The prosecutor commented on the defendant's failure to testify. ¶¶ 65-66.
- The prosecutor appealed to the jury's fear. ¶¶ 56, 68-69.
- The Court held that the cumulative effect of these comments deprived the defendant of a fair trial. ¶ 74.

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Once prosecutorial error is found, courts generally consider the following factors to determine if a reasonable likelihood exists that the prosecutor's error could have affected the verdict

- The nature of the alleged error: what stage of the trial?, was it repeated or isolated?, was it brief or fleeting?, did it relate to a weakness in the State's case or the core of the defense?
- The promptness or lack of a curative instruction
- The strength of the State's case against a defendant

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State v. Botch, No. 1 CA–CR 19–0383, 2020 WL 5834845 (App. Oct. 1, 2020)

"The defense attorney brought up the concept that a reasonable person would not consent to a search of their pockets if they knew they had methamphetamine in it. Believe it or not, **this happens every day throughout – the courts.** People consent to searches even when they have something they are not supposed to have. Who knows what reason**. Maybe it's because they think they are going to bluff their way out**."

This argument was prosecutorial error (step one) because no evidence supported these arguments.

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"I want to talk a little bit about the – the allegation the Defense put on the State here that we should have done more, the officer should have done more by testing the dollar bill or testing the baggies for fingerprints or DNA evidence. You heard from both the officer and the criminalist … that her lab is very backed up. And you heard from the officer say that those type of actions, the DNA testing, the fingerprint testing are reserved for cases of more severity. This case is important to Mr. Botch, and **this case is important to me because I am here representing the state in this matter. I am here also here representing the Constitution.** I believe this case to be just as important as other cases because it does involve Mr. Botch's … livelihood … and life … it involves important things to him."

This comment was prosecutorial error

However, the errors in this case were harmless (did not amount to a due process violation) because the jury instructions cured the errors, and the comments were made once and in response to the defendant's closing argument

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State v. Hernandez, No. 2 CA–CR 2019–0138, 2020 WL 4931691 (Aug. 21, 2020)

"On that day, Officer Jacobs had taken an oath. That oath was when ICS was activated and when that emergency system was activated and his other correctional officers were in trouble, he didn't just sit there and let them fend for themselves. He went running. Unfortunately, **he ran into an inmate that had taken an oath as well. That wasn't an oath based on courage and honor, but based on cowardice, opportunity, and violence.** He was attacked by this defendant and the other inmates. He was attacked by this defendant right here. He was attacked by this defendant and other inmates. At the end of this trial**, the State is going to ask you to find this defendant guilty for the choice he made and the oath that he took and the attack that he and the other inmates did on Officer Jacobs.** We're going to ask you find him guilty."

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Closing Argument

"Over the past three days you have heard about **two separate oaths** at the Department of Corrections. You have seen those oaths. Not only have you heard about them, but you have seen them lived out. You saw the oath that Officer Jacobs and those other correctional officers took. You saw that oath that he took when he wasn't concerned about his safety but [went] into the fight. When he didn't wait for other officers, but went to help the people that he had made that oath to. You see it on the video. He lived that oath and he lived that out. When he told other officers, that if the [worse] case happens I'm going to be there, that's exactly what he did.

Because he took that oath that would put aside maybe his own person feelings and put aside thinking about what's the best thing for him, because he had that oath and had that commitment to the other officers, **this defendant saw the opportunity to live the oath that you have also seen and heard about over the past three days. It's an oath that's not built on courage and honor, but cowardice. It's an oath that looks for opportunity like the one he saw on April 9th, 2015, an opportunity to hit and hurt an officer.**"

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Holding

"Here, there was no evidence of any oath taken by inmates admitted at trial and there is no indication that such evidence was ever anticipated." *State v. Leon*, 190 Ariz. 159, 162 (1997) (closing arguments must be "based on facts the jury is entitled to find from the evidence and not on extraneous matters that were not or could not be received in evidence"); *State v. Bowie*, 119 Ariz. 336, 339 (1978) ("opening statement[s] should not contain any facts which the prosecutor cannot prove at trial").

Thus, the comments constituted prosecutorial error. The defendant failed to establish prejudice because the jurors were instructed that the arguments were not evidence and evidence of the defendant's guilt was overwhelming.

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State v. Zuleger, No. 1 CA–CR 19–0288, 2020 WL 3053792 (June 9, 2020)

The prosecutor argued that the defendant's skin "would have bruised more readily" because he had a titanium plate. This conclusion was not supported by expert testimony and, therefore, was improper.

The prosecutor also mischaracterized the defendant's testimony by stating that the defendant had conceded the distance between the hallway and kitchen. Although improper, "[w]hether or not [the defendant] contested the distance from the hallway to the kitchen has no bearing on whether he premeditated the killing."

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State v. Valdivia, No. 1 CA–CR 16–0867 (forthcoming)

Was there a *Brady* violation or disclosure violation under Arizona Rule of Criminal Procedure 15.1(b)(8) requiring reversal?

- "A Brady violation occurs only when the prosecutor, without regard to good faith or bad faith, withholds evidence that is material to a defendant's guilt or punishment." *State v. Arvallo*, 232 Ariz. 200, 206, ¶ 36 (App. 2013).
- To establish such a violation warranting reversal, a defendant must show: (1) that favorable evidence, either exculpatory or impeaching, (2) was willfully or inadvertently suppressed by the State, and (3) because the evidence was material, the defendant was prejudiced. *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999).
- "Evidence is 'material' for purposes of Brady 'when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.'" *State v. Benson*, 232 Ariz. 452, 460, ¶ 24 (2013) (quoting *Smith v. Cain*, 565 U.S. 73, 75 (2012)).

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Rule 15.1(b)(8): "[T]he State must make available to the defendant … all existing material or information that tends to mitigate or negate the defendant's guilt or would tend to reduce the defendant's punishment[.]"

Although Rule 15.1(b)(8) is broader than *Brady*, a defendant must still establish that the undisclosed evidence was material to warrant reversal. *State v. Borbon*, 146 Ariz. 392, 396 (1985) (holding a violation of Rule 15.1 does not rise to the level of a constitutional violation if the undisclosed evidence was not material).

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Did the State's failure to disclose evidence before trial affect the prosecutorial-error claim?

[Valdivia] doesn't know where [Booty] lives. She doesn't know an E-mail address, anything … to find this person. All she knows is a nickname, Booty, so the police try to pull up who this person is. They are following up on what she's telling them, and of course the first photo that they pull, yeah, that's her, with nothing else to corroborate. Of course she's going to point her finger at the first photo they pull up. She says this looks like a booking photo, so her acquaintance, who now she calls her friend, who she hadn't seen in a while who has a booking photo and only she knows her by the nickname Booty gives her [a] $1,100 check and trusts her to take it to the bank and cash it for her with no plan to meet up later? So she's supposed to be walking around with $1,100 of cash hoping she'll bump into this Booty again? It doesn't make sense. It is not logical.

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Where is this Booty? Where was she on December 4? [Booty] gives [Valdivia] a[] $1,100 check and she doesn't go with her to the bank? She's not waiting outside? She doesn't give her a ride there with doing this big favor for her, when she desperately needed $1,100 to get an ID and why is that? Because she had to run an errand? That's a lot of trust for an acquaintance she hadn't seen in a while and just happened to bump into her. These are red flags about the credibility of this story, the red flags that this story doesn't make sense.

There's no Booty, and even if there's hypothetically someone who was also involved, your jury instructions say the absent participant, if someone was also culpable, that doesn't necessarily take away from her guilt, her culpability, her actions and her choices that day.

[Valdivia] says she wasn't fleeing from the bank because she just had to go to the bathroom, but she never tells the officers I have to go to the bathroom? Doesn't make sense. … If you are arrested for a crime, you don't lead the police directly to the person who is responsible? **Because there's no Booty. This person doesn't exist.**

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State v. Dandsill, 246 Ariz. 593 (App. 2019)

"in this case it is plain and simple felony first degree murder, not the more serious form of premeditated murder. Okay? We're not attempting to prove that [the defendant] drove over there to kill Ramon. That's not on the table. There's not sufficient evidence of that. It may be that that's what he intended, but that is not what we're required to prove to prove this lesser form of first degree murder, felony murder.

So with respect to this lesser form of first degree murder, felony murder, what we must prove is that this was an attempted armed robbery, not a completed armed robbery, not that they got away with the loot, an attempted armed robbery. And in the course of and in furtherance of or immediate flight therefrom, any person was killed.

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But a prosecutor may comment on a defendant's failure to present evidence that the defendant alleges would have been exculpatory. *State v. Herrera*, 203 Ariz. 131, 137, ¶ 19 (App. 2002).

In *Dansdill*, the prosecutor properly argued that the defendant could have called the individuals who were on the receiving end of his phone calls to support his theory of the case. However, if the exculpatory evidence could have been presented only through the defendant's testimony, such an argument is an improper comment on the defendant's Fifth Amendment right. 246 Ariz. at 605-06, ¶¶ 48-51.

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State v. Williams, No. A-0517-17TR, 2019 WL 4492849 (N.J. Super. Ct. App. Sept. 19, 2019)

So when you're coming to think of that, I want you to think of the fact that it's his actions, not his words alone, okay? It's not his words alone. It's not the please and thank you. It's the actions. And I wanted to give, like a little bit of an illustration. And—and this is the—the … how his actions are reflected in the video, how close he got to her, and we know how tall he is from when he walked into … the bank. So, he's clearly making himself right at her level. I wanted to give a little bit of an illustration.

The prosecutor then displayed a still photograph from The Shining. We've all sent this, right? This movie? And, you know, these words, "Here's Johnny." Right? If you've never seen the movie, The Shining, this is creepy, but not scary, right? You've never seen it. All right. This guy looks creepy and he's saying some very unthreatening words, "Here's Johnny." But if you have ever seen the move The Shining, you know how his face gets through that door. So, again, I just point that out to illustrate. It's not just the words; it's what you do before and what you do after the words that matters. And that's what makes it a robbery.

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State v. Murray, 247 Ariz. 447 (App. 2019)

In rebuttal closing argument the prosecutor told the jurors to ask themselves the following questions:

"So here is how to think when you might hear somebody say back there, well, I think one or both defendants **might be guilty but I'm not sure it's beyond a reasonable doubt**. Now, stop and ask yourself another question at that point. Why did I just say that? **Why did I just say that I think the defendants might be guilty?** You are a fair and impartial juror. If you are thinking that, **if you are saying that, is it not proof that you have been persuaded by the evidence in the case beyond a reasonable doubt?** Because why else would you say that were you not convinced by the State's evidence? So when you hear yourself say that, ask yourself the second question why, **why do I think he is guilty? Because he is guilty because you have been convinced by the State's case beyond a reasonable doubt.** That's why you think as you do being fair and impartial." ¶ 32.

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Majority: The Court determined that “these words [] boiled down to their essentials, … is an argument that a belief a defendant ‘might be guilty’ constitutes belief in guilt beyond a reasonable doubt.” And, such an argument “misrepresents the reasonable-doubt standard, under which a juror must be ‘firmly convinced of the defendant’s guilt’ to find the defendant guilty.”

Although improper, the defendant did not establish a due process violation.

Dissent: Murray had established fundamental, prejudicial error based on the lack of a curative instruction, the effect on the jury, the timing of the statement, the fact that the comment struck at the core of the defense, and the evidence was not overwhelming.

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Once prosecutorial error is found, courts generally consider the following factors to determine if a reasonable likelihood exists that the prosecutor's error could have affected the verdict

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Asking a testifying defendant to opine on the veracity of another witness's testimony at trial

- Example: So for what you testified to be true, the detective was lying?
- "Arizona prohibits lay and expert testimony concerning the veracity of a statement by another witness." *State v. Boggs*, 218 Ariz. 325, 335, ¶ 39 (2008).
- This is because the determination of a witness's "veracity and credibility lies within the province of the jury, and opinions about witness credibility are 'nothing more than advice to jurors on how to decide the case.'" *Id.* (quoting *State v. Moran*, 151 Ariz. 378, 383 (1986)).

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Asking questions unsupported by the evidence

- *State v. Arias*, 248 Ariz. 546, 557-58, ¶¶ 41-43 (App. 2020) – the prosecutor insinuated that the expert had romantic feelings for the defendant because he had gifted her a self-help book despite the expert's testimony he frequently gifts self-help books to his patients.

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Questions/Comments

For any questions or comments, please e-mail me at michelle.hogan@azag.gov